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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 234

GRANT J. COWHER,

Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
a Corporation,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF.

FRANCIS H. MONEK,
Chicago, Illinois,
Attorney for Petitioner.

EDWARD B. HENSLEE,
WALTER N. MURRAY,
MELVIN L. GRIFFITH,
Chicago, Illinois,
Of Counsel.

CHAMPLIN-SHEALY COMPANY, CHICAGO

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ARGUMENT.

Respondent's reply brief is ingenious. It does not seek to present this case on its merits as it should have been tried but seeks by arguing certain isolated phases of it to conceal the true issues and rulings of the trial court.

We will not reiterate all we have said in our original petition but will confine ourselves to pointing out a few of the situations which we think respondent has tried to distort or conceal from this Court. We do not abandon any position we took on the trial of this case nor retract anything we said in our petition for certiorari filed here.

On Page 11 of respondent's brief the following statement appears:

> "The court did not comment or state at any time, *in the presence of the jury*, that proof of the custom to be established was inadmissible" (Italics ours).

This statement is written so this Court would get the idea that the trial court never *at any time* said that proof of custom was not admissible. In answer to this we call the Court's attention to the record.

Mr. Monek was starting to prove custom and practice by the plaintiff (R. 81) and Mr. Costello objected. The jury was withdrawn and the offer of Mr. Monek to prove custom and practice was made before the trial judge in chambers (R. 81).

Mr. Costello after this offer was made objected to it and said (R. 83):

> "We are not going to have custom or practice • • • . I contend that it is highly prejudicial because we are only concerned with what happened on the night in question and if there is any question for the jury it is for the jury to determine whether or not on that occasion in question the railroad was negligent. What they do on other occasions, what this one can see from this point of vantage, or what that one can see, is entirely beside the question."

There was some more argument between counsel when the court said (R. 84):

> "If you are charging a custom it would be permissible for you to offer evidence of the custom, but if you aren't charging a custom, then I don't see how you can."

The Court then continues as follows (R. 84):

> "My order is that the testimony be limited to this car, how the brake on this car operated or what he did on this occasion."

After some more argument by both attorneys the Court said (R. 85):

> "Well, at any rate I have indicated my ruling. You can show all these facts and circumstances, the speed and everything else *of this car on this particular occasion.*" (Italics ours.)

The jury was then brought in and Mr. Monek proceeded to put questions to the plaintiff relating to custom and practice in handling cars in that yard. This was objected to by Mr. Costello and the Court sustained this objection (R. 87). Mr. Monek then said:

> "Your Honor, I will have to make another offer of proof."

The Court answered saying (R. 87):

> "We will reserve it for the time being and go on with this car."

All these expressions of the Court show his feelings in the matter and are carried out by his ruling thereafter throughout the case, *before the jury*, when he again and again prevented plaintiff's attorney from introducing evidence of custom and practice as shown in our original brief.

It is true that on each occasion Mr. Monek did not ask *all* the questions necessary to establish custom and practice, but each time he did ask enough questions to establish the fact that the trial court would continue to adhere to his ruling which he had announced in chambers. It would have been folly for him to go on asking questions of the witnesses when the court had already announced his ruling and was adhering to it.

An other attempt to mislead this Court is made on Page 12 of the brief of respondent where it says:

"The Court plainly told petitioner's counsel in chambers that he was sustaining the objection to the offered evidence (R. 97) 'to the form and *not* to the substance.'" (Italics ours.)

It is true that this language was used on another occasion but it had nothing to do with the Court's former ruling on custom and practice. In fact this language was used at another time concerning an entirely different matter. The record is (R. 97):

"Mr. Monek: Mr. Cowher, would at times two or more cars to go to the same destination in a yard?
The Witness: Yes.
The Court: Objection sustained.
Mr. Monek: Was there an objection?
Mr. Costello: Yes, there is an objection. It is the same thing all over again.
Mr. Monek: I think it is competent and I am going to try until it is ruled on.
The Court: I made my ruling to the form, not to the substance."

This colloquy shows conclusively what the Court had in mind when he made this remark as to the basis of his ruling. His ruling on custom and practice was made at a prior time (R. 84) and the jury had been recalled (R. 87). The trial was proceeding under that ruling.

In saying "I made my ruling to the form, not to the substance" the Court was replying to Mr. Monek's statement, "I think it is competent and I am going to try until it is ruled on."

This was in open court before the jury and not "in chambers" as stated in respondent's brief (Page 12). Clearly this ruling applied only to the question asked and the objection raised at that time and had nothing to do with the former ruling of the Court on custom and practice.

Even after *substantially* all of the excluded evidence

was put in the record on the re-cross examination of the defense witness John W. Chatham (R. 263) the Court persisted in ruling out custom and practice (R. 279). A question was asked by Mr. Monek of the defense witness J. E. Makin, who was the yard master at that time:

> "And isn't it customary to allow a man to get up to the brake, test the brake and see if it is safe before he gets off the hump?
> Mr. Costello: I object.
> The Court: Objection sustained."

This ruling could only further convince the jury that the court was still of the opinion that custom and practice had no business in this law suit.

Much time and space in the respondent's brief is devoted to a discussion of the petitioner's refused instruction. They say it is not in harmony with the approved instruction in *Berry* v. *B. & O. R. R. Co.* (Mo.), 43 S. W. (2d) 782 and then proceed to set out in full what it says is the instruction in the *Berry* case.

However, they copy (B27) *the wrong instruction*, taking it from page 776 of that opinion, when the instruction referred to by us is on page 788 of that opinion and reads as follows:

> "If you further believe and find from the evidence that plaintiff went upon such pole in the course of his employment, pursuant to an order or direction of a foreman of the defendant, and that such foreman, in giving plaintiff such order or direction, had authority from defendant to direct and order the plaintiff to go upon said pole as a part of his duties as such employee, and if you further believe and find from the evidence that at the time of such order or direction, if any, the condition of such pole was known, or by the exercise of ordinary care could have been known, to the defendant or its foreman, then your verdict must be for the plaintiff."

Inasmuch as all their argument was based upon the wrong instruction we do not deem it necessary to reply thereto, but direct this Honorable Court's attention to what we have said relative to this instruction in our petition filed herein.

Conclusion.

This case was not fairly and impartially submitted to the jury. There was prejudicial error in the record in the respects suggested by the petitioner. The errors were of such a character that would justify this Court in granting certiorari as prayed by the petitioner. The petitioner was entitled to afair trial. He should have been permitted to introduce the evidence of custom and practice when he offered it. The fact that the trial, appellate and supreme courts of this state have approved this trial is no criterion to go by. They could be wrong. In our opinion they are wrong.

For the reasons given by this petitioner we respectfully insist that a writ of certiorari should be granted and on a final hearing that a new trial be ordered.

Respectfully submitted,

FRANCIS H. MONEK,
Attorney for Petitioner.

EDWARD B. HENSLEE,
WALTER N. MURRAY,
MELVIN L. GRIFFITH,
Of Counsel.